IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

WR-55,161-02

EX PARTE ERIC DEWAYNE CATHEY

ON APPLICATION FOR WRIT OF HABEAS CORPUS
CAUSE NO. 713189-B IN THE 176th JUDICIAL DISTRICT COURT
OF HARRIS COUNTY

***Per curiam*.**

O R D E R

This is a subsequent application for a writ of habeas corpus in a capital case that Applicant filed pursuant to Article 11.071, Section 5 of the Texas Code of Criminal Procedure. Applicant alleged in this application that he is intellectually disabled and ineligible for the death penalty under the United States Supreme Court's holding in *Atkins v. Virginia,* 536 U.S. 304 (2002). We denied relief on this application in 2014. *Ex parte Cathey,* 451 S.W.3d 1 (Tex. Crim. App. 2014).

In 2017, the United States Supreme Court concluded that some of the standards in our caselaw did not comport with the Eighth Amendment's requirements regarding an intellectual disability determination. *Moore v. Texas,* 137 S. Ct. 1039 (2017) ("*Moore I*"). On November 7, 2018, we exercised our authority to reconsider this case on our own initiative. We remanded this case to the convicting court "to consider all of the evidence in light of the *Moore v. Texas* opinion and make a new recommendation to this Court on the issue of intellectual disability."

After holding a hearing, the convicting court made findings of fact and conclusions of law recommending that we grant relief on Applicant's claim of intellectual disability. We disagree.

Applicant continues to rely upon his 1996 WAIS-R IQ score of 77 to establish that he is intellectually disabled. Taking the standard error of measurement ("SEM") into account, Applicant's IQ score range is between 72 and 82. Although we agree that factfinders may consider the concept of the "Flynn Effect" in assessing the validity of a WAIS-R IQ test score, we decline to subtract points from Applicant's obtained IQ score. *Cathey,* 451 S.W.3d at 5. On these facts, Applicant has failed to show the requisite deficits in intellectual functioning. *See Moore v. Texas,* 139 S. Ct. 666, 668 (2019) ("*Moore II*") (stating that, to make a finding of intellectual disability, a court must see "deficits in intellectual functioning—primarily a test-related criterion").

Applicant complains that when we rejected his intellectual disability claim in

2014, we improperly relied on the *Briseno*[1] factors and focused on his "perceived adaptive strengths" and "behavior while incarcerated." Even if we disregard these factors, we may still conclude based on school records and trial testimony that Applicant has failed to prove adaptive deficits. And we will not credit the results of the Vineland Adaptive Behavior Scales administered by Dr. Fletcher. Regardless of whether or not the Vineland can be administered retrospectively, the Vineland reporters in this case were highly motivated to misremember Applicant's adaptive abilities. *Cathey,* 451 S.W.3d at 20. The adaptive behavior Applicant's sister reported to Fletcher as part of the Vineland test was also contradicted by her trial testimony. *Id.*

Under the circumstances presented in this case, Applicant has not established that he is intellectually disabled according to the standards articulated by the United States Supreme Court in *Moore I* and *Moore II*. Based upon our own review, we deny relief on Applicant's intellectual disability claim.

IT IS SO ORDERED THIS THE 28TH DAY OF APRIL, 2021.

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[1] *Ex parte Briseno,* 135 S.W.3d 1 (Tex. Crim. App. 2004).